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IN THE FIJI COURT OF APPEAL
Civil Appeal No. 55 of 1986.

Between: BA TOWN COUNCIL Appellant

- and -

T.F.J. BULLDOZING CO. LTD Respondent

V. K. Kalyan for the Appellant.
S. D. Sahu Khan for the Respondent.

Date of Hearing : 9th March, 1987

Delivery of Judgment: 13th March, 1987

JUDGMENT OF THE COURT

Roper, J.A.

This is an appeal against the refusal of Kearsley J. to issue an interim mandatory injunction requiring the Respondent company to vacate certain land and move a fence-line to its original position.

In March, 1983 the Appellant Council was granted a 99 year lease of 9 acres of Crown land in Ba for the purpose of a botanical garden and on the 22nd September of that year the Respondent applied to the Appellant for permission to use part of that land on a temporary basis as a portable stone crusher site. No specific area of the land was sought, the letter of application referring simply to "the ash dump site next to Rarawai Road". The Appellant's Town Clerk wrote to the Respondent on the 6th October consenting to the use of the land subject to the Respondent's acceptance of certain terms, and the

approval of the Director of Lands. Again no specific area was referred to but it was roughly delineated on an attached plan. The Respondent accepted the terms and it is common ground that before the Respondent went into occupation the Appellant's Town Clerk and a member of the Respondent company met on the site and agreed on the area to be used. However, there is a dispute as to whether, at that time, the Respondent fenced off the whole of the land it was entitled to use, as indicated on the ground by the Town Clerk, or erected the northern fenceline short of the true boundary. In February 1986 the Respondent moved the northern boundary fence to take in more land. This resulted in a protest from the Appellant and something of a confrontation on the site when the Appellant's employees arrived to dismantle the fence and move it to its original position. It appears that the Respondent's employees obstructed the Council workers who withdrew without carrying out the work.

The fence still remains in its new position.

On the 8th April 1986 the Appellant issued a writ seeking possession of the extra land fenced, and a mandatory injunction requiring the Respondent to move the fence to its original position. It later moved for an interim mandatory injunction seeking the same relief, the motion being supported by an affidavit from the Town Clerk in which he said that the agreed area, which was originally fenced by the Respondent, was approximately two roods and that by moving the fence the Respondent had taken an additional two roods - one acre in all.

In an affidavit in reply a director of the Respondent deposed that the area pointed out by the Town Clerk, and agreed upon, was 1 acre but in the first instance the Respondent only fenced off something over half an acre, and that by moving the fence it had taken no more land than it was entitled to.

On the 2nd November 1983 and again on the 8th March 1984 the Appellant had written to the Director of Lands seeking consent to the Respondent's temporary use of the land. No area was mentioned in either letter but the Director replied as follows:-

"

LD4/1/2326

22.3.84

The Town Clerk,
Ba Town Council,
P.O. Box 184,
BA.

Dear Sir,

re : BOTANICAL GARDEN SITE

Your letter of referenced C/4/10 of 8.3.84 on the above subject is acknowledged.

In view of the reasons advanced I have no objections to the temporary sub-letting of one acre of the above site to TFJ Bulldozing Co. Ltd to be used as a stone-crusher site till 30.6.85.

The above consent is granted on the strict understanding that the balance area will be maintained and used in accordance with the conditions of the Approval Notice.

Please advise of your acceptance of the above together with the sub-letting agreement and thirteen dollars fees.

Yours faithfully,

(sgd)
B. LAL
Acting Director of Lands
and Surveyor General "

There is nothing before us to suggest that the Appellant challenged the Director's consent to the sub-letting of one acre.

There was subsequent correspondence between the Appellant, Respondent and Director concerning a proposal that the Respondent should be given a 90 year lease because of its substantial expenditure in improving the site and on the same day that the Appellant wrote to the Respondent calling on it to remove the newly aligned fence it received this letter from the Director:-

"The Town Clerk,
Ba Town Council,
P.O. Box 184,
BA.

LD.4/1/2326

6.3.86

Dear Sir,

Re : BOTANICAL GARDEN/TFJ BULLDOZING CO. LTD

Your letter of 1.11.85 on the above subject is acknowledged.

It is noted that upon representations from the Ba Town Council through their letter G/4/10 of 8/3/84 it was agreed that one acre of the Botanical Garden site could be let out to TFJ Bulldozing Co. Ltd for industrial use. This decision was conveyed to the Council through my letter of 22/3/84.

Agreement of the Directorate of Town and Country Planning was obtained on 25/6/85 to rezone the subject area from Open Space to Industrial and further action is being taken in the matter. You were advised of this situation through my letter of 19/7/85. All these actions have been taken in order to release the area to TFJ Bulldozing Co. Ltd. as suggested in your letter G/4/10 of 13.2.85.

In view of the above factors, the heavy expenditure already incurred by the TFJ Bulldozing Co. Ltd and the rental benefit reaped by the Council through sub-leasing it is regretted that further sub-leasing arrangements cannot be agreed to. Once rezoning of the subject area is completed an Industrial lease will be issued to the TFJ Bulldozing by this Department.

You are to note that the Approval Notice you possess for the Botanical Garden site is subject to survey and the final boundaries will be pointed to all the parties in due course. The area approved for Industrial use is shown edged red on the attached plan and TFJ Bulldozing Co. Ltd has been authorised to erect a temporary fence in accordance with this plan for security purposes.

Yours faithfully. "

On the 2nd April the Director wrote again to the Appellant saying that the letter of 6th March had been "withdrawn", whatever that might mean.

A number of plans purporting to delineate the area to be used by the Respondent were referred to in the course of the hearing but they were not particularly helpful in that no areas are marked upon them. Further, there was no explanation as to why the plan attached to the Director's letter of the 6th March showed the area of land available to the Respondent to be about twice that shown in any other plan produced although still referred to as one acre.

Another curious feature of the case is this letter from the Respondent to the Appellant:-

"The Town Clerk,
Ba Town Council,
Ba.

Dear Sir,

RE : EXTENSION OF FENCE ADJACENT TO STONE CRUSHER SITE, BOTANICAL GARDEN SITE

This is to confirm that I have erroneously extended above fence and undertake to restore the old fence excluding this area which will be for exclusive use of the council. I intend to apply to council and Director of Lands for additional land as I am running short of space for my operation and if such application is not approved then we undertake to remove the fence.

Yours faithfully,
TFJ BULLDOZING CO. LTD

DIRECTOR. "

The letter appears on the face of it to be an unequivocal admission that the Respondent had fenced more land than it was entitled to, but according to an affidavit by a Director of the Respondent these were the circumstances in which it was written:-

"(a) That the said Rajendra Prasad (The Town Clerk) came to our Office and intimated that he intended to help us in resolving this matter and that there was nothing he could do from his side but he could assist us in getting the matter resolved.

(b) That he informed us that the best way to resolve this matter would be that we accept the fact that we had erroneously extended the relevant fence and/or also put in an application to the Council for additional land.

(c) That I informed the said Rajendra Prasad that that cannot be correct because we were not committing any trespass as our understanding was that we were on the land that was originally given to us and to this the said Rajendra Prasad said there has been some mix-up on the part of the Town Council and if he drafted a letter in an apologetic form to the Town Council it would be easier for him to resolve the matter.

(d) Then accordingly he drafted a letter for us the way he felt would facilitate amicable resolution of the relevant matter and I annexe herein and marked as Annexure "A" is a copy of the hand written draft of the letter and which was drafted by the said Rajendra Prasad."

There is no denial of the facts stated.

As to the law, Kearsley J. cited the following passage from Bean on Injunctions, 3rd Edition at page 29, and Mr. Kalyan accepted it as a correct statement of the law:-

"An interlocutory application for a mandatory injunction is a very exceptional form of relief (Canadian Pacific Railway v. Gaud [1949] 2 KB 239 at 249); the courts will not normally compel a defendant to do so serious a thing as to undo what he has done except after a full hearing (Gale v. Abbott (1862) 6 LT 852). Time, money and materials may have to be expended in carrying out the order, and, if at the trial it is held that the interlocutory relief should not have been granted, the expenditure will have been unnecessary. When the final result of the case cannot be known and the court has to do the best it can, the case has to be unusually strong and clear before a mandatory injunction will be granted, even if it is

> sought in order to enforce a contractual obligation. The case must be 'unusually sharp and clear' (Shepherd Homes Ltd v. Sandham [1971] Ch 340) and the court must feel a high degree of assurance tht at the trial a similar injunction would probably be granted. If there is doubt about this, the interlocutory application must fail (Hounslow London Borough Council v. Twickenham Garden Developments Ltd [1971] Ch 233)."

Kearsley J. concluded that the Appellant's case for an interlocutory injunction did not meet the criteria referred to in that passage from Bean, and we can only agree. Although the application for the injunction was based substantially on an allegation that the Respondent was occupying one acre when it was only entitled to half an acre, Mr. Kalyan was compelled to take a different line, having regard to the references to one acre in the correspondence.

He submitted that the land the company was entitled to was that pointed out on the ground by the Town Clerk, whatever its area, and that the original fence line was at the boundary of that area. The company agrees that an area was pointed out but claims that it did not fence off the whole area in the first instance. It is impossible to say where the truth lies on the information before us.

Mr. Kalyan next submitted that the case came within the principle of Daniel v. Ferguson [1891] 2 Ch. 27, the headnote to which reads:-

> " The Defendant in an action to restrain him from building so as to darken the Plaintiff's lights, upon receiving notice of motion for injunction, put on a number of extra men, and by working night and day ran up his wall to a height of nearly 40 feet before receiving notice that an ex parte interim injunction had been granted. It appeared to be a question of some nicety whether the lights were ancient lights. On the motion coming on, Stirling J., restrained the Defendant from further building, and from permitting the wall which he had erected to remain;-

> Held, on appeal, that this order was right, as the Defendant had endeavoured to anticipate the action of the Court by hurrying on his building, and that what he had erected ought therefore to be at once pulled down, without regard to the ultimate result of the action."

There is no question in the present case of the Respondent trying to steal a march on the Appellant after the proceedings had been issued.

Another matter that weighs with us is that nowhere in the Appellant's pleadings is there any suggestion that the Appellant will suffer damage or loss if the fence remains where it is until the substantive proceedings are heard.

Mr. Kalyan raised two further matters, which were not argued in the Court below and were not included in the grounds of appeal. They were first, that the Respondent had not applied for planning approval to move the fence line; and secondly, that the Respondent's occupation of the whole area was unlawful as it had entered into occupation before the Director's consent was received. These matters do not even arise on the substantive proceedings as the pleadings stand, but perhaps with suitable amendments they could be raised. We were not prepared to consider them on the present application.

In our opinion Kearsley J. had no option but to refuse the application. The appeal is therefore dismissed with costs to the Respondent, to be taxed if not agreed.

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Vice-President

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Judge of Appeal

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Judge of Appeal